Supreme Court, U.S.
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(3)

No. 03-1463

IN THE

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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June 1, 2004

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

1. **There is a conflict among the courts of appeals.** Respondent correctly points out that where district courts are given discretion to decide a particular issue, and hundreds of opportunities to exercise that discretion are presented, the decisions will vary. Respondent also correctly asserts that, under Rule 39(b), inadvertence as the sole cause of an untimely filing is a negative factor. However, respondent cannot deny, if a district court decides, where inadvertence was the sole reason for a failure to file on time, that a jury trial should nevertheless be granted because the delay was short, the date of trial distant, and there was no inconvenience to the court or harm to the other party, that its decision would be affirmed upon appeal in every circuit except the Ninth and possibly the Second, and that it would be reversed in the Ninth Circuit. The question presented by the petition is whether one clear and unambiguous interpretation of Rule 39(b) should exist in the Ninth Circuit and a different clear and unambiguous interpretation should be followed in all the other circuits.

2. **The question presented by the petition is properly before this Court.** Respondent correctly asserts that a jury trial was denied by a magistrate and that no objections were filed, so the decision was not reviewed by the district court judge. Respondent incorrectly contends that this constituted a waiver by the petitioner of his right to appeal. The Magistrates Act provides, in 28 U.S.C. § 636(b)(1)(A) that where non-dispositive matters are involved, a district court judge may reconsider a magistrate's determination only "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." An honest objection in

this action would have had to state that the magistrate's decision was in accordance with law because it was required by a long, consistent line of decisions of the Court of Appeals. Failure to file a plainly futile objection does not constitute a waiver.

Moreover, if there were a waiver, it would be excused. Respondent made this same argument before the Court of Appeals, which ignored it and affirmed on the merits. *See Oklahoma City* v. *Tuttle*, 471 U.S. 800, 815-16 (1985) (Court reached merits despite party's failure to object to jury instruction because Court of Appeals overlooked the default); *Ulster County Court* v. *Allen*, 442 U.S. 140, 149 (1979); *On Lee* v. *United States*, 343 U.S. 747, 750 n.3 (1952).[1/]

Petitioner knew, when he filed an appeal to the Court of Appeals, that he had no chance of reversal by the three-judge panel. Such panels do not overrule decisions made by other panels of the same court, and certainly not a line of consistent decisions made by other panels.[2/] Petitioner's only hope was the slim chance of a grant of a petition for rehearing en banc. It now appears that this will never happen. The only way that the court below can be brought into harmony with the courts of appeals throughout the country is by action by this Court. That would require probably only a small expenditure of effort by the Court and little or no dissent within it.

[1/] Respondent also contends that the magistrate's denial of a jury trial was not made on motion, as required by Rule 39(b). But it was made in response to a motion by respondent and, in any event, Rule 39(b) is satisfied if a party files a motion "or some similar manifestation of that party's desire to have a jury trial." Wright and Miller, FEDERAL PRACTICE AND PROCEDURE Civil § 2334 (3d ed. 2002); *see also* MOORE'S FEDERAL PRACTICE, ¶ 39.08 (2d ed. 1996) ("any written notification of the party's desire for a jury, such as an untimely demand, may be treated as a Rule 39(b) motion").

[2/] *United States* v. *Hayes*, 231 F.3d 1132, 1139-40 (9th Cir. 2000).

CONCLUSION

The administration of our judicial system would be improved, and made more fair, if a literal interpretation of Rule 39(b) were to be applied throughout the United States rather than in most of the circuits. The petition should be granted and the existing conflict resolved.

Respectfully submitted,

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